F. M. S.

[CRIMINAL REVISIONAL JURISDICTION]
TERRELL, Ag. C.J.
September 14, 1933.

PUBLIC PROSECUTOR
vs.
LIEW HIN *ALIAS* LIEW WAH

[REVISION OF THE DECISION OF THE MAGISTRATE KLANG]

Penal Code Section 498—Enticing away a married woman—Enticement.

It is essential for the prosecution to show on a charge of taking or enticing away a married woman under Section 498 of the Penal Code that the solicitations and advances came from the man.

Record called for and order made on revision *ex parte.*

TERRELL, ACTING C.J.—Under the powers conferred on me by section 55 of the Courts Enactment and section 321 (i) of the Criminal Procedure Code I called for the record in the above case. The accused was convicted of an offence under section 498 of the Penal Code, being charged with enticing away and detaining one Wong Ah Loke knowing her to be a married woman.

Two of the essentials of the offence are (1) that the accused enticed away a married woman and (2) that he knew that she was married. It must be remembered that under the Criminal Law of India adultery is in itself a crime, section 497 of the Penal Code of India, whereas under the Penal Code of the Colony which is law here section 497 has been omitted.

The facts appeared to be that there was a marriage ceremony in China in 1917 between the parents of Wong Ah Loke and of the complainant Khong Yew Kah, who was then three years old. The complainant came with his parents to the Khong Fook Fo Tin Mine at Sungei Way in 1920. Wong Ah Loke did not accompany them but came later. On the 8th April, 1932, Wong Ah Loke left the complainant's house. Over a year later she was found to be living with the accused at Tras in Pahang. Information was then laid and he was arrested.

Wong Ah Loke's evidence in cross-examination is as follows:—

> "It is true that I requested you to take me away. I did tell you that I have no husband. I said so because I was ill-treated by my husband."

Wong Ah Loke was a witness for the prosecution and her evidence which was confirmed by the accused must be accepted. I do not accept the Indian authority *re Kumarasami,* 2 M.H.C. 331, cited in paragraphs 5607 and 5608 of Gour in which Scotland, C.J. lays it down that it is quite immaterial if the woman was the tempter. To my mind it is essential for the purposes of a conviction to prove that the solicitations and advances came from the man. The essence of the case is 'enticement' and the words of a penal section cannot be strained against the accused. If there was no "taking or enticement" there cannot be an offence under section 498.

This interpretation is in accordance with the English authorities on the analogous cases of a charge of taking away a girl under 16 from the possession of her parents, see *Rex* vs. *Jarvis,* 20 Cox Criminal Cases 249, and the English and Indian cases cited in Gour in the notes to paragraph 3807.

Then again there was no evidence that the accused knew she was married. The evidence of Wong Ah Loke herself is to the effect that she told him that she was not married. Even, therefore, if enticement had been proved, there was no *mens rea.*

The accused, therefore, ought never to have been convicted and the conviction must be set aside.

Conviction setaside.

[ORIGINAL CIVIL JURISDICTION]
TERRELL, Ag. C.J.
September, 12, 1933.

COLLECTOR OF LAND REVENUE, KLANG
Applicant

vs.

1. TAN TOH
2. YONG NEE CHAI

Respondents.

[SELANGOR CIVIL APPLICATION No. 88 OF 1933]

Land Code 1926 Sections 141 to 148, 230, 238 and 240—Sale at the instance of chargee—Deposit of duplicate memorandum of charge with Collector—Return to chargee on completion of sale—Powers of Collector to correct errors.

On a sale of land held by Entry in the Mukim Register the Collector has no power to cancel either the original or the duplicate copy of the memorandum of charge and no right after completion of the sale to retain the duplicate copy deposited with him by the chargee in accordance with Section 142 of the Land Code.

The power of the Collector to make corrections under Section 230 (*e*) of the Land Code 1926 is restricted to the correction of errors in documents of title and memorials thereon. The general power of correction conferred by Section 230 (*b*) is ancilliary to the right to call for documents, and does not exist in the case of documents kept in the custody of the Collector.

R. C. Cussen, Deputy Legal Adviser, for Applicant.

Respondent No. 1 absent.

Ramani for Respondent No. 2.

Cur. Adv. Vult.

TERRELL, AG. C. J.—This is a reference to the Court by the Collector of Land Revenue, Klang, with the sanction of the Commissioner of Lands, under Section 238 of the Land Code.

The question arose upon the sale of land held under E.M.R. at the instance of the chargee.

The original reserve price fixed by the Collector was $31,350/–. After one or two abortive attempts to sell the chargee bought in for $28,000/– and the land was transferred to the chargee, a memorial of the cancellation of the

charge being made on the register and issue documents of title in accordance with the provisions of section 147(i) of the Land Code. The Collector also cancelled the Register copy of the Memorial of Charge but not the duplicate copy, which had been deposited with him under the provisions of section 142 of the Land Code.

The chargee wishes to sue for the balance of the amount due on the charge and may be precluded from doing so by the fact that the register copy of the charge has been cancelled. He has accordingly required the Collector to remove the cancellation on the register copy of the charge.

The points to be decided are:—

(1) whether the Collector was right in cancelling the register copy of the Memorandum of Charge.
(2) whether the duplicate copy should be returned to the chargee and
(3) whether, if satisfied that the cancellation was wrong, the Collector has any power to make a correction without an order of Court.

A charge under the Land Code, like an ordinary mortgage, has a dual aspect. It contains a personal covenant to pay, and makes the land a security for the advance (see Form XXIVa). By virtue of section 75(ii) a charge whether in respect of land held under E.M.R. or certificate of title must be presented " in duplicate or more."

When, however, the chargee wishes to enforce his charge the procedure is very different in the case of an E.M.R. (hereafter referred to as case A) and in the case of a Certificate of Title (hereafter referred to as case B.)

In case A the chargee must first pursue his remedies against the land (section 148). In case B he can pursue his remedies on the personal covenant first if he so desires.

As regards sale the procedure is also different. In case A the sale is carried out by the Collector, in case B under the direction of the Court. In case A the Collector signs a memorandum of transfer to the purchaser in form XXXIII and delivers it to the purchaser with the issue document of title (Section 144). In case B the officer of the Court delivers to the purchaser a certificate in form XXXIV with the issue document of title (section 152). Thereupon in each case the purchaser may present the issue document of title together with the transfer or certificate, as the case may be, for registration.

So far there are no differences which are not explained by the fact that in one case the sale is carried out by the Collector and in the other under the direction of the Court.

It is now pertinent to inquire what happens to the Memorandum of Charge and its entry on the Register. *A priori* one would expect that the procedure would be the same in each case. It will be found, however, that not only is the procedure entirely different for reasons which it is difficult to appreciate, but it is also incomplete.

In case A the duplicate Memorandum of Charge has to be deposited with the Collector under section 142 when the chargee obtains an order for sale. In case B the chargee under section 150(i) (as amended by Enactment 31/28) has to deposit with the Court all documents of title in his possession. In section 2 of the Land Code, ' Document of title ' is defined as follows:—

> "Document of Title" includes a register document of title and an issue document of title.

To my mind it clearly does not include a duplicate Memorandum of Charge.

The result, therefore, is that in case A the duplicate Memorandum of Charge has to be deposited, and nothing is said about the document of title, and in case B the document of title has to be deposited and nothing is said about the duplicate Memorandum of Charge. In neither case are there any further directions as to what is to be done with the duplicate Memorandum of Charge whether deposited or not. In case A under section 144 on completion of the purchase the Collector shall hand over the issue document of title to the purchaser, but there is no indication as to how it came into the Collector's hands.

In case A section 147(i) lays down how the land is to pass to the purchaser. The section commences—

> "Upon the registration of any memorandum of transfer by the Collector as aforesaid....."

Unfortunately no registration has yet been mentioned in case A, whereas in case B the Registrar, on presentation of the document of title together with the certificate, *'shall register the same'* (see section 152).

Section 147(i) proceeds to lay down that the land shall vest in the transferee free and discharged from the charge in respect of which the land was sold, but (section 147(ii)) subject to any prior charges.

In case B, section 152 makes no similar provision in favour of the purchaser.

Then section 147(i) proceeds to direct the Collector what to do with the memorial of the charge upon the Register. It says:—

> "the Collector shall upon the registration of such transfer make a memorial upon the register and issue documents of title cancelling such charge or charges."

This, at all events, makes it clear that in case A the title is cleared from the particular charge in respect of which the land was sold and the purchaser has a clean title.

In case B the Code is silent as to any cancellation of the charge. Presumably from the difference in the provisions some different result was contemplated where land under certificate of title is transferred to a purchaser, but what result, I should hesitate to speculate. Fortunately the question does not arise for decision on the present application.

The Court was referred to sections 130 and 131, but these clearly deal with quite different matters. Section 130 deals with the discharge of a charge in pursuance of a memorandum in one of the forms in Schedule XXV, and section 131 is limited to a discharge of a charge made in

Form XXIV (b). Neither of these sections has anything to do with a sale by the chargee.

There are no sections prescribing the Collector's duties on a sale by a chargee except those quoted above and it is quite clear that the Collector is not directed on the completion of the sale to do anything in particular with the register or duplicate copies of the Memorandum of Charge, and in the absence of any provision I have no doubt that he has no authority to cancel either copy. Presumably if he has authority to cancel the register copy he could also cancel the duplicate copy. It is the whole theory of registration of titles that the issue or duplicate copy of a document agrees with the register copy. I have already pointed out that a charge has a dual aspect. So far as the charge on the land is concerned, that has been got rid of so as to clear the title, but the personal covenant remains, and in fact section 147 contemplates that it shall remain after the remedies against the land have been exhausted. The duplicate charge having been handed to the Collector under section 142, it would be logical if the Collector endorsed upon it and upon the Register copy the amount by which the charge has been reduced as a result of the sale, but the Code does not so provide, and I conceive that in these circumstances all that the Collector can do after the completion of the sale is to return the duplicate charge to the chargee to enable him to sue upon the covenant.

The question whether the Collector, if satisfied that his cancellation of the Register copy of the Memorandum of Charge was wrong, could correct it depends upon the construction of section 230(e) of the Code. This sub-section, however, makes it clear that the Collector can only correct errors in documents of title and in memorials made thereon. The only general power of correction is given by section 230(b) and is ancillary to the right to call for various documents including a charge. This power is obviously not available when the document is already in the Collector's possession. The cancellation, therefore, can only be corrected under order of Court made in pursuance of section 240.

I hold, therefore, that the cancellation of the charge should never have been made, and I direct that such cancellation be corrected and that when corrected the duplicate memorandum of charge be returned to the chargee. I also hold that in the circumstances of the case the Collector had no power to correct it himself.

As regards costs it is provided in Rule 4, sub-rule 1 of 1932 that the costs of and incident to all proceedings in the Supreme Court shall be in the discretion of the Court. This is clearly a proceeding in the Supreme Court and the costs are, therefore, in the Court's discretion. It was argued that under section 237 (as amended by Enactment 28/31) there is provision for costs in the case of an appeal to the Court and that inferentially the Court has no power to give costs on a reference under section 238, but I think the general jurisdiction of the Court in such matters can only be ousted by express words, and it is to be observed that on a reference under section 37 of the Estate Duty Enactment of 1929, where the procedure is very similar to the procedure under section 238 of the Land Code, section 37(v) expressly negatives the Courts ordinary jurisdiction. I would, therefore, allow the respondent chargee his costs against the Collector.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

MUDIE, J.

August, 31, 1933.

L. R. M. SUBRAMANIAM CHETTIAR. Plaintiff.

vs.

1. **S. K. KADER MASTAN & CO.**
2. **K. S. *alias* KUNA SEEYANA *alias* S. K. *alias* SEENA KAVANA KADER MASTAN**
3. **M. M. ZAINALABIDIN**
4. **N. M. SYED MOHAMED**
5. **S. K. MOHAMOODU**
6. **N. M. NOOR MOHAMED**
7. **M. S. A. ABDUL WAHAB *alias* S. A. ABDUL WAHAB.....Defendants.**

[PERAK CIVIL SUIT No. 100 OF 1933]

Partnership—Retiring partner's liability—Failure to withdraw share of capital—Failure to notify remaining partners of retirement—Liability unaffected by intention to abandon interest.

Mere abandonment and inactivity by a partner who has given up all hope of recovering his share does not affect his position in regard to liabilities in respect of the partnership business.

S. Seenivasagam for Plaintiff.

J. M. M. Lewis for 5th Defendant.

MUDIE, J.—This is a suit for $3,326.25 being principal and interest due on a promissory note executed by Kadermastan & Co., and Abdul Wahab in favour of the Plaintiff. There are seven defendants, but the issues now being tried are only between the Plaintiff and the fifth defendant, hereinafter referred to as the defendant.

The plaintiff alleges and the defendant denies that he was a partner in Kadermastan & Co. when the note was signed. The defendant admits that he became a partner in 1929. He says that he ceased to be a partner on the 31st March, 1931, and that the plaintiff had notice of it.

The defendant went to India in 1929, and there became involved in legal proceedings with S. K. Kadermastan, the principal partner in Kadermastan & Co. Ill-feeling arose between them. The defendant says that Kadermastan told him that he, defendant, had to leave the firm. On his way back to Malaya, defendant says he told the plaintiff, who was travelling in the same steamer, that he was going to leave the firm. He arrived in Ipoh in January, 1931. He says—"I told the people here what had happened in India." He took over the shop next door to Kadermastan & Co., and started a new business